No. 12,679

IN THE

United States Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, and SINTON & BROWN, a copartnership composed of Howard Brown and Richard Roe Sinton and John Doe Sinton,

Appellants-Defendants,

vs.

COWDEN LIVESTOCK CO., a corporation,

Appellee-Plaintiff.

Appellants-Defendants' Reply Brief

Upon Appeal from the District Court of the United States for the District of Arizona

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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INTRODUCTION

The assertions in plaintiff's briefs, when considered in connection with the references made to the record, disclose that plaintiff relies upon: (1) certain irrelevant conclusions which could divert the Court's attention from the real issues of the case as framed by plaintiff's complaint (R. 2-5) and defendants' answer (R. 19-25), and (2) certain errone-

ous conclusions based upon the self-serving statements of plaintiff's corporate officers which are in conflict with the clear fact testimony of the same officers and the documentary evidence.

Plaintiff's brief makes much of the fact that Adams, upon his original contact with defendants, purported to sell them a one-half interest in the cattle, a fact said to be unknown by plaintiff until the fall of 1947 (Br. 6, 7, 8). Since it is uncontroverted that defendants, by virtue of authority delegated by Adams, had authority to sell the cattle for the amounts charged, with the duty to split the profits (R. 2-5, 70, 71, 74-76, 119-121), and that they actually turned over to Adams the half of the profits that belonged to the plaintiff-Porter-Adams arrangement (R. 105, 106), it is merely deft smokescreening to quibble over the clearly irrelevant questions of whether defendants, in making the sales, were doing so as mere agents or as part owners of the cattle, or whether defendants, in remitting to Adams, were doing so as mere agents or as part owners of the proceeds. Plaintiff did not allege and does not contend that defendants lacked authority to sell the cattle for the prices charged; the question before the Court is whether Adams had authority to collect the plaintiff-Porter-Adams half of the sale proceeds.*

Plaintiff assumes that Adams, in making the collections, was acting contrary to plaintiff's interest (Br. 6, 7, 11). If,

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*Despite the irrelevancy of plaintiff's conception of the deal with defendants, the stress which plaintiff places thereon leads defendants to point out one feature of this conception that borders on the ridiculous. According to plaintiff's president, defendants were to advance plaintiff .15¢ per pound at the outset and "make a further advance of .01¢ per pound at the time settlement was completed." (Plaintiff's Statement of Case, p. 4). Why a "further advance" would be in order when "settlement was completed is beyond comprehension.

however, Adams had implied authority to make the collections, then the contention that he may have intended to misappropriate and later misappropriated the money so as to be acting adversely to plaintiff's interests certainly is irrelevant to the resolution of the issues in this case. Furthermore, plaintiff's attempt throughout its brief to paint Adams as a sort of "bogey-man" who, from the outset, was plotting the "appropriation of plaintiff's cattle" (Br. 11) is totally unconvincing: If Adams were the thief that plaintiff would make him out, he certainly acted strangely in choosing to steal only $44,494.49 of the $169,612.53 which was available to him.*

Three of plaintiff's conclusions are that: (1) plaintiff did not know all of the material facts pertaining to Adams' collections (Br. 8, 10-13); (2) plaintiff did not affirm and acquiesce in Adams' collections (Br. 5, 12); and (3) Adams in making the collections did not intend to act for and on behalf of the plaintiff-Porter-Adams arrangement (Br. 5, 6, 12). Whether or not these conclusions are warranted can be ascertained only from the testimony of plaintiff's corporate officers and the surrounding circumstances. For this reason all such testimony is catalogued and exhibited in two appendices to this brief. Appendix "1" sets forth all of the testimony bearing on what plaintiff knew on July 16, 1947 (the date of the plaintiff-Adams settlement), and Appen-

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*Adams was dead and unable to defend such charges. There is, however, nothing in the testimony pertaining to his relationship to, and dealings with plaintiff (all of which necessarily came from plaintiff's officers), which supports such a conclusion. Certainly plaintiff didn't treat Adams like a thief for in Adams' words: "I had full charge of same (the cattle) to handle as I saw fit. * * * I went to Cowden Livestock Company office in Phoenix and made a settlement with them and it was satisfactory at the time. * * *" (R. 255).

dix "2" sets forth all of the testimony bearing on what plaintiff did after the July 16, 1947, plaintiff-Adams settlement.

Any realistic view of this testimony compels the conclusions that, notwithstanding the self-serving statements of plaintiff's officers, (1) plaintiff did know all of the material facts pertaining to Adams' collections; (2) plaintiff did affirm and acquiesce in Adams' collections; and (3) Adams in making the collections did intend to act for and on behalf of the plaintiff-Porter-Adams arrangement. The self-serving statements of plaintiff's officers are also refuted by the documentary evidence. For example, when plaintiff's secretary-treasurer was questioned about Exhibit "C" (R. 134, 135) during plaintiff's case, his testimony was unequivocal that:

> "Q. Were your records completely silent as to the 44,000?
>
> A. That is correct." (R. 161)
>
> "Q. Is that your entire accounting document; there was no other document other than that?
>
> A. None whatsoever." (R. 158)

Later, during defendants' case, when confronted with the damning Exhibit "J" (R. 211), which proved to be the missing second page to Exhibit "C" and which contained the telltale final entry "Due from Adams . . . $44,794.49," the witness was forced to renege on his earlier testimony as follows:

> "Q. Is there not an entry on there, on this second sheet, showing 'Due from Adams $44,794.49'?
>
> A. That is correct." (R. 213)
>
> "Q. Do you have another copy of this sheet? (Exhibit "J")

A. Of this sheet, yes, sir, I have a yellow copy." (R. 213)

Under these circumstances—the trial court sitting without a jury and, seventeen months after trial, uncritically accepting in toto the plaintiff's resolution of fact issues, where the evidence is partly oral and the balance is written and deals with undisputed facts, and where the written evidence and undisputed facts render the credibility of the oral testimony of plaintiff's officer witnesses totally untrustworthy—this Honorable Court may ignore the trial judge's findings and substitute its own. *Orvis v. Higgins,* 180 F.2d 537, 539, 540 (C.C.A. 2 1950); cert. denied ..... U.S. ....., 95 L.Ed. 20 (1950); *Dollar v. Land,* 184 F.2d 245, 248, 249 (C.C.A. D.C. 1950) cert. denied ..... U.S. ....., 95 L.Ed. 75 (1950); *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.,* 178 F.2d 541, 548 (C.C.A. 9 1949); *Home Indemnity Co. of New York v. Standard Acc. Ins. Co.,* 167 F.2d 919, 923 (C.C.A. 9 1948).

ARGUMENT

I. The District Court Should Have Dismissed Plaintiff's Complaint for Nonjoinder of the Indispensable Parties-Plaintiff, the Plaintiff's Joint Venturers.

A. PLAINTIFF, PORTER AND ADAMS WERE ENGAGED IN A JOINT VENTURE.

Plaintiff, choosing to ignore the two cases cited by defendants as directly in point *(Mid-Columbia Production Credit Ass'n v. Smeed,* 171 Ore. 140, 136 P.2d 255 (1943); *Moore v. Diehm,* 200 Okl. 664, 199 P.2d 218 (1948) followed in *Moore v. Beier,* ..... Okl. ....., 210 P.2d 359 (1949)), contends that the plaintiff-Porter-Adams arrangement was not a joint venture because (says plaintiff) there was lack-

ing therefrom "the equal right of each of the parties in the management and control of the undertaking" (Br. 2). As pointed out in Appellants' Opening Brief (pp. 15, 16), each of the three parties to the venture did actually participate in the management thereof. Assuming, however, arguendo, that as plaintiff contends, plaintiff had the sole control of the decisions governing the venture, this fact does not militate against the conclusion that the arrangement was a joint venture. For as stated in the treatise cited by plaintiff (Br. 3):

> ". . . one joint adventurer may be intrusted with the actual control of the enterprise without changing its status as a joint adventure. . . ." (48 *C.J.S.* 811, Section 2)

Indeed, another case cited by plaintiff, *United States Fidelity & Guarantee Co. v. Dawson Produce Co.,* 200 Okl. 540, 197 P.2d 978, 982, 983 (1948), not only recognizes that mutual control can be placed in the hands of one joint venturer, but also holds that the status of the legal "title" to property (about which plaintiff dwells at length) is not determinative of the question of the existence of a joint venture.

Analysis of the four cases cited by plaintiff reveals why plaintiff's Statement of the Case is completely silent about the undisputed fact that each of the parties to the plaintiff-Porter-Adams arrangement was to bear equally any losses resulting therefrom. Two of these cases contain the crucial affirmative finding that the arrangement there considered did not involve any loss-sharing feature. *Joe Balestrieri & Co. v. Comm. of Int. Rev.,* 177 F.2d 867, 872 (C.C.A. 9 1949); *Beck v. Cagle,* 46 Cal. App. 2d 152, 115 P.2d 613,

619 (1941). Another, *Rae v. Cameron,* 112 Mont. 159, 114 P.2d 1060 (1941), supports defendants' position that the plaintiff-Porter-Adams arrangement was a joint venture, and the other—*Carboneau v. Peterson,* 1 Wash. 2d 347, 95 P.2d 1043 (1939), a tort case—involves an automobile trip "joint adventure" situation, which is clearly not in point.

Plaintiff's attempt to gloss over the loss-sharing feature of the plaintiff-Porter-Adams deal, is recognition that such a feature is foreign to a mere agency relationship, and it constitutes a tacit admission that the deal was a joint venture.

B. LESS THAN ALL JOINT VENTURERS CANNOT SUE ON OBLIGATION TO JOINT VENTURE.

The "even if" argument advanced by plaintiff to avoid the fatal effect of the joint venture relationship to its lawsuit, is that "where a claim belongs to a joint adventurer *in his own right,* he may sue along thereon" (Br. 3). This unquestionably is the rule of law as set forth in the treaties and in some of the cases cited by plaintiff. Unfortunately for plaintiff, however, the claim here does not belong to plaintiff "in his own right." Although legal title to the cattle remained in plaintiff until sold by defendant, the cattle were clearly part of plaintiff's contribution to the joint venture. That title was voluntarily relinquished by plaintiff when defendants made the sales authorized by plaintiff. The resulting proceeds, to which plaintiff could not possibly claim exclusive title and for which plaintiff is now seeking complete recovery, were the asset of the joint venture. With the sale of the cattle, plaintiff's title thereto was extinguished, and its only right to a portion of the debt owed by defendants on the sale rested in its undi-

vided interest in the joint venture. Therefore, none of the cases cited by plaintiff is in point, and the rule of this court as set forth in defendants' opening brief (pp. 19-21) compels the dismissal of plaintiff's complaint.

II. The Plaintiff Has Received Payment of All Monies to Which It Is Entitled.

A. ADAMS, AS JOINT VENTURER OR AGENT OF PLAINTIFF, WAS AUTHORIZED TO RECEIVE THE MONIES PAID BY DEFENDANTS.

As to plaintiff's contentions with respect to this and each of defendants' subsequent arguments, the Court is referred to the Introduction and the Appendices hereto.

Defendants reassert that there is *not a whit of testimony directly denying that Adams had authority to make the collections or establishing that he was forbidden or had agreed not so to act.* With respect to the two threads of testimony by which plaintiff (Br. 5) would refute that statement, the Court will observe that:

(1) Plaintiff's expression of dissatisfaction of Adams' collection came *after* the act and therefore could hardly be said to have forbidden the completed act.

(2) Porter's statement that all monies were to be sent to plaintiff fails to negative, and it impliedly supports, the conclusion that *both* Adams and Porter had authority to collect the sale proceeds with the duty to remit to plaintiff.

Since implied authority is as effective as express authority (*Restatement of the Law of Agency, Section 7*), the fact that Adams "never purported to receive monies from defendants as agent for plaintiff" has no bearing on this

point. "Purporting to act" plays no part where implied authority exists. Plaintiff's ill-chosen reference to this factor at this portion of the argument convinces that, obsessed with the technicalities of the majority rule of ratification, it would attempt to apply those technicalities to a situation where that rule has no application.

Where a principal by word (express authority) or act (implied authority) grants an agent authority to collect monies, it makes no difference whether the agent at the time of collection purports to act for and on behalf of his principal or otherwise. Whether the situation may be different where "apparent authority"* is involved (see *Restatement of the Law of Agency, Section 8*), is of no concern to this action, since no one contends that "apparent authority" existed.

Plaintiff's argument (Br. 6) to the effect that an act which is adverse to the interests of the principal is outside any implied authority of the agent constitutes another example of plaintiff's reliance upon legal generalities which are inapplicable to the issue of this case which is: Did Adams have authority to collect the monies in question? The collection of monies by an agent on behalf of his principal cannot be said to be adverse to a principal's interest and certainly is not within the rule relied upon. Defendants have never contended that Adams had "implied authority to convert the principal's property to his own use." Furthermore, if Adams had authority to make the collections in question, any hidden intent to steal the funds which

*Authority held to exist as a matter of law where no actual (express or implied) authority exists but where a principal by word or act has indicated to a third party that authority does exist in an agent, sometimes called "agency by estoppel."

plaintiff would attribute to Adams, could hardly defeat that authority.

As to plaintiff's other remarks defendants observe that plaintiff's blase treatment (Br. 7) of the law of agency as it exists in Arizona is hardly an answer to the irrefutable logic of the authorities found in pages 23-32 of defendants' opening brief.

B. PLAINTIFF ACCEPTED PAYMENT AND OTHER PERFORMANCE BY ADAMS AS FULL SATISFACTION OF ANY CLAIM AGAINST DEFENDANTS.

Plaintiff's argument completely fails to destroy the analogy of the situation in *Neavitt v. Upp,* 57 Ariz. 445, 114 P.2d 900, 902 (1941) (Appellants' Opening Brief, p. 32, 33).

III. The Defendants Are Innocent Parties in This Matter, and Since It Was Plaintiff's Acts and Acquiescence for More Than Three Weeks in Adams' Collections of the Monies in Question Which Caused the Loss, Plaintiff Must Bear That Loss.

With respect to plaintiff's contentions on this argument, suffice it to note that plaintiff is totally unable to give any reasonable explanation why defendants would "willfully disregard" any letter which might be designed to protect them from misdirecting payment.

IV. The Plaintiff in Settling with Adams, Accepting His Checks, and Acquiescing Thereafter for More Than Three Weeks in Adams' Collection of the Monies, Thereby Ratified His Collections.

Plaintiff's contentions as to this argument are answered in the appendices except as to one point: Defendants' statement that "while Adams in making the collections did not purport to be acting for and on behalf of plaintiff, defend-

ants knew at the time that they paid over the monies to Adams that he was acting for and on behalf of plaintiff" is, as plaintiff says (Br. 12), at variance with the testimony of defendants. As explained at page 45 of Appellants' Opening Brief the statement is based upon the lower court's finding, lifted from the mouth of plaintiff, that defendants had notice of plaintiff's interest in the cattle and therefore Adams' agency by virtue of the letter of May 15, 1947. Since plaintiff relied upon the technicalities of the majority rule of ratification, it can hardly be expected that defendants will not take advantage of the finding that was advanced to support those technicalities.

CONCLUSION

Defendants submit that they paid plaintiff in full when they paid Adams, plaintiff's joint venturer. Even under plaintiff's theory plaintiff at least selected Adams to deal with defendants concerning the cattle. Adams did deal with defendants concerning the cattle and arranged to have the cattle shipped to defendants for feeding and sale. Defendants performed all of their obligations under the deal and made full payment to Adams. Payment to Adams was payment to plaintiff, because Adams possessed implied authority to receive payment for plaintiff.

Plaintiff's attempt to recoup its self-inflicted loss from defendants by branding Adams (its own man) as a thief, comes with particular ill grace when, for twenty-four days after it settled with Adams, it made no objection to the fact that Adams "desired to use * * * temporarily" the monies for which it now seeks recovery (R. 35, 36) and even consented that he do so.

Law and justice indicate that plaintiff should not prevail. For the reasons stated in this and in their Opening Brief, defendants respectfully request that the Court enter judgment in their favor.

Respectfully submitted,

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(Appendices follow)

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What Plaintiff Knew on July 16, 1947, the Date of the Plaintiff-Adams Settlement

(ALL QUESTIONS HERRIN DESIGNATED WITH AN "X" WERE ASKED BY DEFENDANTS' COUNSEL; ALL OTHERS WERE ASKED BY PLAINTIFF'S COUNSEL)

What Plaintiff's President Learned in the July 8, 1947 Telephone Conversation with Adams During Which the July 16, 1947 Meeting Was Arranged

Q. . . . .

A. " * * * I asked him if the cattle had all been sold, and he said they had, and that he had the statement of sales, I think is what he said, and he would mail it up to me." (R. 84)

XQ: . . . .

A: "Well, Adams told me over the telephone that Sinton & Brown had sent him a check for the cattle, but I didn't know that it was made out to Adams. I assumed it was made out to the Cowden Livestock Company until he came up here." (R. 102)

XQ "* * *, did you ask him then to forward to you the check from Sinton & Brown?

A "No, I asked him to come up and would settle the deal up." (R. 125)

XQ . . . . . .

A "Well, I know that Adams told me over the telephone that he had mailed me a statement from Sinton & Brown, and this is the envelope, is what they came in. I didn't know what the statement consisted of or anything like that." (R. 158)

XQ "Did Mr Adams on that occasion state to you anything about the payment to him by Sinton & Brown, or any payments?"

A "No." (R. 158)

XQ "Did you ask about any such payments?"

A "Well, I told him we had not heard from Sinton & Brown and I thought it was time we got the matter settled up, and he said 'I will mail you the statements, I have the statements, and I will come up there and we will settle it up.' As I remember his conversation, that is what it was." (R. 158)

XQ "You assumed, Mr Cowden, at that time that Sinton & Brown had paid for the cattle, had you not?"

A. "Well, I didn't know whether they had paid for the cattle or had not paid for them until he was up here, definitely." (R. 158)

XQ "* * * I am asking you now if you assumed they had been paid for?"

A. "I assumed that if he had a statement of the closing of the operation that they might have sent the check with it." (R. 158, 159)

XQ. "You did know, did you not, that on or about July 5th, Sinton & Brown paid Adams $19,450 as one-half the net profits?

A "No." (R. 146)

XQ "You did not know anything about that?"

A "No." (R. 146)

XQ Did you at any time acquire knowledge of those figures and when those payments were made?"

A. "No, I didn't acquire knowledge of any of them until—oh, the 7th or 8th of July." (R. 146, 147)

XQ: . . . . . .

A. "* * * in August or later * * * that is the first thing I knew of $19,450.00 (R 147)

XQ. . . . . .

A "* * * I knew he received some money. He told me he would mail me settlement, which he did a little after that, it wasn't the 7th or 8th it was probably a day or two after that. * * *" (R. 147)

XQ "But you knew then on or about the time you are now mentioning that Sinton & Brown had paid to Adams some of the money on those cattle sales?"

A "I did." (R. 147, 148)

XQ "You don't recall how much money, but you knew it had been paid?"

A He didn't tell me the amount." (R. 148)

XQ "Did you ask him?"

A "No, I don't know as I did." (R. 148)

XQ Did you ask him whether or not there was any balance due from Sinton & Brown to be paid on that arrangement.

A. No, because I made a definite arrangement for him to come up here and make settlement on the deal." (R. 148)

XQ "So you did not inquire as to whether or not Sinton & Brown had paid the full amount?"

A. "Not on the telephone." (R. 148)

What Adams Told Plaintiff's President at the July 16, 1947 (Wednesday) Meeting

Q: "When he informed you as to the fact that Sinton & Brown had paid him the money, what, if anything, did you do or say?"

A: "I assumed when Adams came up here and told us he was ready to settle it, that they had remitted." (R. 141)

XQ "It is customary in these matters that when you render a statement to submit the check with it or the money with the statement, isn't that true?"

A "That is true." (R 159)

Q: "You knew that Mr. Adams had directly collected his part of the proceeds?"

A: "That is true, he said he had." (R. 96)

XQ "Did you wonder why he had given you a a check that was not to be deposited at the time it was dated?"

A: "He explained it by saying that he had used a portion of the money out of these steers to buy another bunch of cattle which he shipped on Monday and Tuesday before he came up here on Wednesday, and would have the return from that shipment." (R. 143)

XQ . . . . .

A "Well, I believed what he told me in saying that he had used a part of the money to buy this bunch of cattle. Although he didn't have the cash, I thought he had something that he had spent the money for." (R. 145)

XQ: . . . . .

A Yes, I believed him, because he told me that he had used a part of the money and would have it there." (R. 141)

XQ "* * * he had already told you that he had secured the $142,000 from Sinton & Brown?"

A "I don't think he told me the amount he secured from them. (R 144)

Q "Do you know whether or not he got that $112,000 from Sinton & Brown?"

A: "Well, he told me that he did." (R. 145) (Established as conversation of July 16) (R. 146)

XQ . . . . . .

A "I knew on the 16th of July when Mr Adams came up here to settle up that he had received some of the money, but I didn't know he had received all of it." (R. 154)

XQ . . . .

A He said me " * * * he had used a part of the money that he received from Sinton & Brown to pay for the cattle that he was shipping on Monday and Tuesday of that week before he came up here Wednesday. * * * (R. 104)

Q . . . . .

A "He told me he had used a part of the money in paying for cattle that he had received and shipped on Monday and Tuesday * * *." (R. 97)

Q . . . . .

A: "* * * He said, " * * * bought some cattle down here which we will receive Monday, and I used a part of this money to pay for them. * * *" (R. 86)

Q * * * he told you that he had already used some of the money which Sinton & Brown had paid him?"

A That is true. (R 97)

Q. And didn't have it then that he could turn it over to you?"

A That is correct (R. 97)

XQ . . . . .

A. I didn't know of that ($129,000) until after the $44 000 check had been presented and not paid * * *." (R 147)

XQ * * * did you inquire of Mr Adams * * * as to whether or not there was any balance due from Sinton & Brown?

A You mean on July 16th? (R 148)

XQ Well, not necessarily that day, but on or about that day.

A. "The only time I discussed that with Mr. Adams was when he came up here on the 16th of July to settle with us." (R 148)

What Plaintiff Claimed Not to Know on July 16, 1947— Plaintiff's President's Testimony

XQ "Now, when you received the $44,000 check from Roy Adams in July, 1947, you knew that Sinton & Brown had paid Adams all of the money that was due to anyone concerned in the profits on those cattle?"

A "No, I knew it." (R 102)

XQ "Now, when that settlement sheet was drawn up, did you at that time have knowledge that Sinton & Brown had remitted all of the proceeds from the cattle to Roy Adams?

A. "No, I did not." (R. 128)

XQ. "When did you acquire that knowledge?"

A Some time in August." (R 102)

XQ. .

A "* * * It was after that date (August 9 1947) that I acquired knowledge that full payment had been made to Adams" (R 103)

XQ . . .

A "I found that out after August 8th." (R 106)

XQ "* * * so far as Adams was concerned, he had, prior to the time he mailed * * * this amount to you, * * * settled with Sinton & Brown on the sale of those cattle?"

A "I knew he at least had a statement of the amount. I didn't know whether he settled in full or what the arrangements was". (R. 125)

XQ "* * * maybe you didn't know, but you did when you got this account, did you?"

A "* * * I knew he at least had a statement of the amount. I didn't know whether he settled in full or what the arrangements was". (R. 125)

Q. "At the time, on July 16th, when this $44 000 check was tendered to you, if you had known at that time the manner in which the deal had, in fact, been handled between Roy Adams and Sinton & Brown, that is, the $18,000 advance in February, the $120,000 draft in May, $44,000 in May or June, and $19,000 in the settlement in July, would you have accepted the settlement or the check?"

A I would not have." (R. 151)

Plaintiff's Secretary-Treasurer's Testimony (R. 159, 160, 161)

XQ You know, did you not, and I am speaking of you personally, that when this settlement was prepared that Sinton & Brown, or Roy Adams, had received payments for those—"

A "No, I didn't. That sheet was prepared from the feed sheets, and the settlement sheets that Sinton & Brown had forwarded to Roy Adams. He forwarded them to us in that envelope that I showed you over there

XQ "Yes"

A And from all of those figures I worked up this yellow sheet this settlement sheet. Now there is nothing on Sinton & Brown's statements there to indicate that they paid any money to anybody

XQ. "I understand * * * we are referring to Defendants' Exhibit B?"

A "I think that is right"

XQ " * * * I asked you if you personally knew that payments had been made"

A No I did not. You could not tell from that and I had not talked to Roy

XQ "You assumed they had been made?

A "I assumed that there had been or the check would follow these documents

XQ. "When did you acquire that knowledge * * *? (that Sinton & Brown had advanced Adams several different sums)

A "Oh, we acquired the first knowledge through the Valley Bank the latest part of August

What Plaintiff Did After the July 16, 1947 Plaintiff-Adams Settlement and Why

(ALL QUESTIONS HEREIN DESIGNATED WITH AN "X" WERE ASKED BY DEFENDANTS' COUNSEL; ALL OTHERS WERE ASKED BY PLAINTIFF'S COUNSEL)

Plaintiff's President's Testimony

Q: "Did he pay you the money which was coming to you, Mr Cowden?"

A: "He gave the Cowden Livestock Company one check for $112,000 and another check for 44,000 some odd dollars, and he said, 'Now, put this $112,000 check on the bank because I have the money there.' He and I bought some cattle down here which we will receive Monday, and I want a part of this money to pay for them. Hold the $44,000 check until Saturday and put it in the bank it will be good.'' (R. 86)

Q: "Now, Mr Cowden, the figure of 44,000 some odd dollars which you say was set forth in the second check, how do you reconcile that with the 57,000 odd dollars which was used for in this action?"

A: "Well, the difference in the 57,000 and the 44,000 represents the interest that Mr Adams and Mr. Porter had in the deal." (R. 94, 95)

Q: "I believe you stated that he told you that he had already used some of the money which Sinton & Brown had paid him

Q: and didn't have it then that he could turn it over to you?"

A: "That is correct." (R. 97)

Q: "I presume it was our understanding, then, that he either had that money or the assets which had been put in it to which you could look for payment of the money due?"

A: "He told me he had used a part of the money in paying for the cattle that he received and shipped on Monday and Tuesday before he could pay me——" (R. 97)

Q: On Wednesday?

A: "On Wednesday, he came here on Wednesday, and as soon as he received the proceeds from that, well, the check would be good. That is the reason he wanted me to hold it until Saturday." (R. 97, 98)

Q: "It was on the basis of that understanding that you accepted the check?"

A: "That is correct." (R 98)

WEDNESDAY—JULY 16, 1947
Plaintiff takes two of Adams' personal checks ($112,000.00 and $44,794.49) and agrees not to deposit latter until Saturday, July 19, 1947. Adams promises to have funds to cover same by Monday, July 21, 1947, stating he has used a portion of the monies from the steers sold by defendants to buy other cattle, the proceeds from which he will have by that time

XQ: "And on that occasion you accepted from Roy Adams two checks, did you not?"

A: "That is correct." (R. 103)

XQ: "Now you, acting for the Cowden Livestock Company and perhaps for Porter, actually did settle with Roy Adams on this three-party arrangement that the three of you had, did you?"

A: "In the manner in which I have testified to, yes." (R. 148, 149)

XQ: "And the only thing left to be determined was the payment on the $44,000 check. If that check had been paid it would wipe the books clean, wouldn't it, between you and Adams?"

A: "Yes, sir." (R. 149)

XQ: "Then at the same time you took this $44,000 check?"

A: "Yes." (R. 142)

XQ: "Mr Adams told you at that time that that check would not be good until, oh, the first of next week, isn't that true?"

A: "He told me to hold it until Saturday and deposit it on Saturday of that week." (R. 142, 143)

XQ: "And then he went further and said that the money would be in the bank by Monday?"

A: "The money would be there." (R. 143).

XQ: "Did you wonder why he had given you a check that was not to be deposited at the time it was dated?

A: "He explained it by saying that he had used a portion of the money out of these steers to buy another bunch of cattle which he shipped on Monday and Tuesday before he came up here on Wednesday, and would have the return from that shipment." (R. 143)

XQ: "Did you assume him to be in a solvent condition when he gave you this $44,000 check with the request not to present it immediately?"

A: "Well, I believed what he told me in saying that he had used a part of the money to buy this bunch of cattle. Although he didn't have the cash, I thought he had something that he had spent the money for." (R. 145)

Q: "What, if anything, did you do about it, Roy?"

A: "I did just as I told you. We put the $112,000 check in the bank the next day." (R. 86)

Q: "And was that paid?"

A: "That was paid." (R. 86)

THURSDAY—JULY 17, 1947
Plaintiff deposits Adams' $112,000.00 check and bank immediately gives proceeds to plaintiff

XQ: "One was, I believe, in the amount of $112,000?"

A: "That is correct." (R. 103)

XQ: "Was that Adams personal check?"

A: "Yes, sir." (R. 103)

XQ: "And that was good?"

A: "Yes, sir." (R. 103)

XQ: "Now, when Mr. Adams gave you this check for $112,000, you deposited that check immediately, didn't you?"

A: "Deposited it the next day." (R. 142)

XQ: "And that check was paid?"

A: "That is correct." (R. 142)

XQ: "And that money came out of the Roy Adams personal bank account, isn't that correct?"

A: "Yes, that is correct." (R. 142)

XQ: "Did you know at that time how the money which it represented got into his account?"

A: "I did not." (R. 142)

SATURDAY—July 19, 1947
Plaintiff deposits Adams' $44,794.49 check.

XQ: "Now, simultaneous with that, he gave you another check for $44,000?"

A: "44,000 some odd dollars." (R. 103)

XQ: "Yes, and did he tell you that that check was, or would be paid when deposited, or make any statement concerning it?"

A: "He told me that if I would hold the check until Saturday and deposit it, that it would be paid, that he had used a part of the money that he received from Sinton & Brown to pay for the cattle that he was shipping on Monday and Tuesday of that week before he came up here Wednesday, and he would have the money back and pay the check that was deposited on Saturday." (R. 103, 104)

XQ: "Did you hold that $44,000 check and not deposit it prior to the time that he had asked you to hold it up?"

A: "I did hold it until Saturday." (R. 104)

XQ: "That was four days, Wednesday to Saturday?"

A: "That is correct." (R. 104)

"What, if anything, happened to the $44,000 check?"

A: "It was returned on account of insufficient funds on the 23rd, I think of July." (R. 86, 87)

WEDNESDAY—July 23, 1947
Adams' $44,794.49 check returned to plaintiff for insufficient funds.

XQ: "Was the check returned for insufficient funds?"

A: "Yes, sir." (R. 104)

"And what, if anything, did you do when that occurred?"

A: "Mr Clements—I was out of town, and Mr. Clements immediately contacted Mr Adams and he told him to put the check back in, it would be all right." (R. 87)

"And did you put the check back in?"

A: "Yes, sir." (R. 87)

THURSDAY (about)—July 24, 1947
Plaintiff's Secretary-Treasurer contacts Adams; Adams advises to redeposit check, that same will be all right, plaintiff again deposits check

XQ: "And then when was it that Mr Adams informed either you or Mr. Clements to redeposit that check?"

A: "The following week." (R. 104)

XQ: "Do you know approximately what day of the week it was?"

A: "Well, I would say it would be from Tuesday to Thursday, some place in the week there, the middle of the week." (R. 104)

XQ: "That would make it be about what date in July?"

A: "Oh, some time from the 24th to the 27th. I would think I could look at a calendar and tell approximately." (R. 104)

XQ: "And then you presented this for payment, did you, this $44,000 check?"

A: "We returned it for collection at the suggestion of the bank." (R. 105)

"And what, if anything happened?"

A: "Well, the check was put in for collection, and held probably a week. We contacted the bank and they said there was no funds available for payment." (R. 87)

THURSDAY (a week later)—July 31, 1947
Bank advises plaintiff that there still are no Adams' funds available to cover check

"And what, if anything, did you do?"

A: "I contacted Mr Adams. He came to Phoenix early in August." (R. 87)

EARLY AUGUST
Plaintiff's President again contacts Adams.

Q: "I believe the first week in August you were out of the State, is that right?"

A: "That is true. I had to go to Albuquerque, New Mexico, to attend a meeting of the committee on the Foot and Mouth Disease." (R. 87)

Q: "It was when you returned from there that you learned the check had not been paid?"

A: That is correct. (R. 87)

EARLY AUGUST (before August 6, 1947)
Plaintiff determines Adams' $44,794.49 check is uncollectible.

XQ: "And when did you determine that that check was uncollectible?"

A: "Early in August." (R. 105)

XQ: "When, before the 7th of August, we will say?"

A: "I'd say before the 6th of August, because I had to go to Albuquerque to attend a meeting on the Foot and Mouth Disease on the 5th and 6th. I think it was. I had planned to be in Phoenix, but it was necessary for me to go there. (R. 105)

Q: "Did you do anything toward communicating with Sinton & Brown at that time?"

A: "Well, immediately on my return from Albuquerque I spent one or two days in Prescott taking care of some necessary business there, and I came right on to Phoenix. Mr Adams had been up here a few days prior to that, but he did not come to see Mr Clements. I was out of town myself, and on Saturday of that week, the 9th, I think it was, I wrote a letter and sent it by registered mail to Sinton & Brown, and asked them for a return receipt to be sure that they received it." (R. 87, 88)

SATURDAY—August 9, 1947
Plaintiff writes defendants for the first time since May 15, 1947 and demands $57,612.53

XQ: "Did you inform Sinton & Brown that Mr Adams' check had not been paid or cashed?"

A: "I did on the 9th." (R. 105)

XQ: "Of August?"

A: "Of August, as soon as I returned to Phoenix." (R. 105)

XQ: "Did you make any complaint to Sinton & Brown prior to the 9th of August concerning the way that Sinton & Brown had settled with Roy Adams on this transaction?"

A: "No." (R. 105)

. . . .

A: (Plaintiff's Secretary-Treasurer) " * * * We had hopes that we would collect that check." (R. 102)

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